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BEFORE THE
DEPARTMENT OF TRANSPORTATION
WASHINGTON, D.C.

Petition of

UNITED PARCEL SERVICE CO.
(DHL Airways, Inc.)

Docket OST-2002-13089

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ANSWER OF DHL AIRWAYS TO MOTION AND
AMENDMENT NO. 2 TO PETITION OF UNITED PARCEL SERVICE

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COUNSEL FOR DHL AIRWAYS, INC.

December 16, 2002

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DEPARTMENT OF TRANSPORTATION
WASHINGTON, D.C.**

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**ANSWER OF DHL AIRWAYS TO MOTION AND
AMENDMENT NO. 2 TO PETITION OF UNITED PARCEL SERVICE**

DHL Airways, Inc. ("Airways") hereby replies to the Motion of United Parcel Service Co. ("UPS") filed in this docket on December 5, 2002 for Leave to File an Otherwise Unauthorized Document together with Amendment No. 2 to the UPS Petition.

In what now has become a routine practice for UPS, the motion seeks leave to file additional unauthorized documents: a recent press article and a three-year-old decision of the European Commission ("EC") in a proceeding to which neither Airways nor either of its two shareholders was a party. In its motion, UPS claims, predictably, that these items support its oft-repeated claim that the Department should institute a formal adjudicatory proceeding before an Administrative Law Judge ("ALJ") to review Airways' citizenship. As neither document is in any way relevant to such request, Airways will not object to UPS's motion, even though it is patently obvious that UPS has failed to show any basis, let alone good cause as

required by the Department's Rules of Practice,¹ why leave should be granted to further burden this docket with more irrelevant material.

As a pretextual attempt to justify its submission, UPS argues that: 1) the recent acquisition by Deutsche Post AG ("DP") of the shares of DHL International Ltd. ("DHLI") that it did not already own -- a fact disclosed to the Department previously -- signifies DP's "now clear emergence as the sole entity having complete control over DHL Airways" (*UPS Amendment No. 2*, at 4); and 2) the EC's conduct of an investigation and issuance of a decision in 1999 relating to a proposed acquisition by DP of another German company supports UPS's proposition that the Department should authorize an investigation into Airways' citizenship. For the reasons set forth below, both arguments are entirely without merit or relevance to this proceeding.

1. According to the press article proffered by UPS, DP, which for some time has held a majority interest in DHLI, recently acquired the 24.4 percent of DHLI's shares that it did not already own. (DHLI is the parent company of DHL Holdings, which holds 25 percent of the voting equity and a minority (45 percent²) total equity interest in Airways.) UPS claims that this share acquisition "eliminates any doubt that may exist regarding [DP's] . . . ability to control DHL Airways . . ."³ UPS's claim, however, is frivolous and the "evidence" on which it is based is entirely irrelevant to this proceeding. Contrary to UPS's allegation, the share

¹ 14 C.F.R. § 302.6(c).

² UPS erroneously states that Holdings has a 49% interest in Airways' total equity. *UPS Amendment No. 2*, at 1.

³ *Id.* at 2.

acquisition does not alter or affect Airways' citizenship in any way: DP continues to hold an indirect minority interest in Airways, just as it did before the share acquisition when the Department confirmed that Airways continues to be a U.S. citizen.⁴ Moreover, DP's increased ownership interest in DHLI offers no actual or potential ability to control Airways because it does not in any way change or diminish the ownership and control of Airways held and exercised by its U.S. shareholder. Finally the DP purchase was previously reported to the Department; DP's ownership and control of DHLI was unaffected by the additional purchase and has no effect on the ownership or control of Airways.

2. Second, UPS proffers in this docket a three-year-old decision of the EC relating to a proposed acquisition by DP of another German company for no apparent purpose other than to impugn DP's integrity. As UPS well knows, but fails to acknowledge, Airways was not a party to the EC proceeding. In fact, UPS does not even claim that the case has any specific relationship to the United States or this proceeding.

UPS claims that the EC decision "has a familiar ring to it" in the context of this proceeding. On that particular claim at least, UPS is correct. Its proffer of an irrelevant EC decision involving DP in support of a petition challenging the right of a U.S.-licensed company -- Airways -- to compete with UPS in the United States does have a "familiar ring," as another ploy of the sort that the Department has rejected in the past. In January 2001, UPS filed a petition challenging the

⁴ UPS does not (and indeed could not credibly) claim that DP's acquisition of the remaining shares of DHL International constitutes a change in Airways' ownership.

Department's decision to grant a foreign air freight forwarder license to DHL Worldwide Express, Inc. ("DHLWE"). UPS alleged that various EC decisions and proceedings demonstrated that DP would use the license to distort competition in the United States. In May 2001, the Department denied UPS's petition and categorically rejected those allegations:

[UPS contends that] circumstantial evidence requires denial of DHLWE's application, including the fact that Deutsche Post has been the focus of numerous [EC] investigations. . . . However, UPS has failed to provide any information showing that those investigations involve DHLWE There is no evidence on the record to establish that Deutsche Post or DHLWE (or its predecessor company) have engaged in unfair competitive practices in the United States.

Order 2001-5-10, at 7. UPS now is attempting to manufacture a case against Airways by offering similar "circumstantial evidence," but, once again, has failed to establish that such "evidence" has any relevance to the United States or, any connection to Airways.⁵

Stripped of its innuendo and rhetoric, UPS's argument is risible: UPS essentially is claiming that, because Airways has an indirect minority shareholder that was the subject of an EC investigation, the Department should disregard its long-established procedures for reviewing citizenship, its specific finding that Airways continues to be a citizen, and refer the "complaints" of UPS and its cohort, Federal Express, about Airways' citizenship to an ALJ who can exercise the

⁵ UPS also refers to "certain facts" contained in the November 18, 2002 *ex-parte* letter of Senator Rockefeller to Assistant Secretary Van de Water. *UPS Amendment No. 2*, at 2. As Airways pointed out in its answer to UPS's Motion and Amendment No. 1 (whereby UPS moved to include the Rockefeller letter in this docket), that letter contains the Senator's conclusions, not "facts." See *Airways Consolidated Answer to UPS Amendment No. 1*, at 2-3. UPS later implicitly recognizes this critical distinction when it states that the letter contains an "allegation." *UPS Amendment No. 2*, at 3.

“independence”⁶ UPS evidently believes the Department lacks.

3. In conclusion, Airways does not object to the inclusion in the record of the materials proffered by UPS in conjunction with this latest amendment to its petition, even though those materials and the text of the Amendment contain no facts or evidence of any relevance to this proceeding. In fact, UPS’s filing, by exemplifying the lack of evidence to support its petition, underscores the need for the Department to reject UPS’s baseless allegations against Airways and the Department and deny UPS’s petition.

Respectfully submitted,



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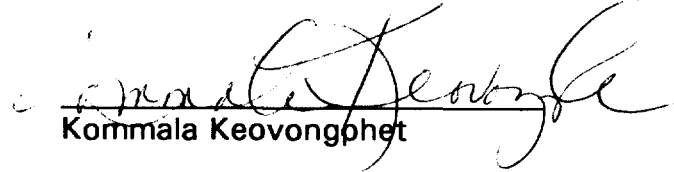
COUNSEL FOR DHL AIRWAYS

December 16, 2002

⁶ See *UPS Amendment No. 2*, at 3. UPS irresponsibly and contemptuously continues to question the Department’s “independence” for no apparent reason other than that the Department has reached a decision about Airways’ citizenship with which UPS does not agree. Ironically, the Department’s recent decision confirming Airways’ citizenship and its prior decision dismissing other UPS and Federal Express complaints about Airways’ citizenship (Order 2001-5-11) demonstrate that the Department is more than capable of rendering an independent judgment, notwithstanding the prodigious influence UPS can exert, both directly and indirectly. See *Airways Consolidated Answer to UPS Amendment No. 1*, at 5 n.4.

CERTIFICATE OF SERVICE

I hereby certify that I have served copies of the foregoing Answer of DHL Airways to Motion and Amendment No. 2 to Petition of United Parcel Service this 16th day of December, 2002 by first class mail, postage prepaid to all persons on the attached Service List.


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